

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

ANTHONY L.P. O’NEAL, JR.,

Plaintiff,

v.

**ROD UNDERHILL, JONATHAN H.
TUCKER, AUDREY B. HIRSCH, and
OREGON DEPARTMENT OF JUSTICE,**

Defendants.

Case No. 3:15-cv-00773-SI

OPINION AND ORDER

Anthony L.P. O’Neal, Jr., 4605 NE Killingsworth #3, Portland, Oregon, 97218, *pro se*.

Ellen F. Rosenblum, Attorney General, and Craig M. Johnson, Assistant Attorney General, Department of Justice, 1162 Court Street NE, Salem, Oregon 97301. Of Attorneys for Defendants.

Michael H. Simon, District Judge.

Plaintiff Anthony L.P. O’Neal, Jr., (“O’Neal” or “Plaintiff”) filed a Second Amended Complaint (“SAC”) (Dkt. 34) on February 18, 2016. In the Court’s previous Opinion and Order (Dkt. 30), the Court granted Defendants’ motion to dismiss O’Neal’s First Amended Complaint without prejudice. The Court gave O’Neal leave to file his SAC by January 8, 2016, and affect service of the summons and SAC by February 8, 2016. Because O’Neal filed the SAC more than

a month after the deadline imposed by the Court and had not yet affected proper service on the named defendants as of March 7, 2016, Defendants moved for an order striking the SAC under Federal Rule of Civil Procedure 15.

O’Neal does not oppose Defendants’ motion. In fact, on March 16, 2016, Defendants submitted a declaration from their attorney Mr. Craig Johnson stating that O’Neal sent Mr. Johnson an email that indicates that O’Neal no longer wishes to pursue litigation. Dkt. 36 ¶ 3. Defendants submitted a copy of the email to the Court. *Id.* at 3. The email states that O’Neal does not desire further to pursue “these matters” because “all collection activities have stopped.” *Id.* The email also explains that O’Neal will “resubmit any civil action with representation” if the need arises. *Id.*

Federal Rule of Civil Procedure 15 governs the manner in which a party may amend its pleading during litigation. *See generally* Fed. R. Civ. P. 15. In pertinent part, Rule 15 permits a plaintiff to amend its pleading “once as a matter of course” within twenty-one days after service, or “if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” Fed. R. Civ. P. 15(a)(1)(A)-(B). Otherwise, a party wishing to amend its pleading must obtain either “the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). “The court should freely give leave when justice so requires.” *Id.*

A district court may, “on its own initiative,” dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Wong v. Bell*, 642 F.2d 359, 361 (9th Cir. 1981). The court need not give the plaintiffs notice of the court’s intention to invoke Rule 12(b)(6) when it is clear that the “[p]laintiffs cannot possibly win relief under the statute they have urged.” *Id.* at 362.

Because O’Neal not only failed to file the SAC and affect service by the deadlines but also now indicates that he no longer wishes to pursue litigation, justice does not require giving O’Neal leave untimely to file the SAC. Accordingly, the Court grants Defendants’ motion to strike the SAC (Dkt. 35). O’Neal concedes that the circumstances that led him to file the SAC no longer exist and states that he has no intention of continuing to prosecute this case. Because this is the third time that O’Neal has filed a complaint in this case without either stating a claim or showing that he intends diligently to pursue his claims, the Court finds that leave to amend would be futile. The Court therefore dismisses the case with prejudice. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (“A district court does not err in denying leave to amend where the amendment would be futile.”).

IT IS SO ORDERED.

DATED this 25nd day of March, 2016.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge